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THE LEASING CLAUSE IN THE CLAYTON ANTI-TRUST ACT.

Section 3 of the Clayton Anti-Trust Act declares it to be unlawful for any person engaged in commerce to lease, etc., any goods, etc., for use in the United States on the condition that lessee shall not use or deal in the goods of a competitor of lessor, where such condition may substantially lessen competition or tend to create a monopoly. This section, so far as it applied to leases, was claimed to be unconstitutional, as leases are not commerce. United States v. United Shoe Machinery Co., 234 Fed. 127.

Trieber, District Judge, as to this objection, said: "It may be conceded that every lease is not commerce, but that is not conclusive that none may be. Each case must be determined from the peculiar facts shown to exist in that case. When a corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels instead of selling them, why is it not as much engaged in commerce as if it sold them outright?"

This is not a very satisfactory answer to a legal objection. But the court goes on to refer to decisions upholding the White Slave Act as authority. But are those cases very close? This question seems to us more closely related to necessary reasoning to sustain the Child Labor Law.

In the White Slave Law there could be consideration of morality being affected in the state to which a woman is being transported. In the Child Labor Law the morality of another State than where child labor is permitted could not be hurt. Nor might it be alleged that other goods in the course of transportation could be injuriously affected by those produced by child labor, as they could not be said to be unsanitary.

Even, however, should the Child Labor Law be sustained, the decision might not cover the lease clause in the Clayton Act, and we might be forced to look to consequences of such clauses in the states where they are intended to have effect. Then also we have to say that the existence of such clauses in states generally tends to create a monopoly, not in trade, but in their reflex effect on shipments in trade.

We know that for a very long time insurance companies have been trying to get under the commerce clause, but the Supreme Court has held that policies were merely contracts as are other contracts. Is not a lease a contract, like any other contract? The strict logic of things would seem to lead to this result, but questions under the commerce clause are more practical than theoretical. If a sale for shipment in interstate commerce with such a condition as above stated can be forbidden, because a condition annexed thereto tends to create a monopoly, it would seem very difficult, indeed, to say a mere arrangement for passing possession of a chattel might not be condemned for the same reason.

We have always understood that, strictly, interstate commerce concerns transportation therein, but opinions sustaining the Sherman Act have carried us past that point, and we must now admit that commerce may be controlled so as to prevent monopoly as to articles shipped therein. If the shipment is of articles sold, it would seem the same as to shipment of articles leased. In neither case does anti-trust legislation take hold because of the contract of sale or lease, but solely because of commerce between the states being used in the enforcement of a condition that may work for monopoly. Facilities that are controlled only by Congress may by it be

prevented from being perverted to private, as against public, interest. Taking these facilities out of the reach of states was not designed to allow their being operated to state injury.

NOTES OF IMPORTANT DECISIONS.

GARNISHMENT — MONEY VESTED IN TRUSTEE BY AGREEMENT BETWEEN MORTGAGOR AND MORTGAGEES.—In Minneapolis Threshing M. Co. v. Calhoun, 159 N. W. 127, decided by Supreme Court of South Dakota, it appears that by consent of mortgagees the mortgagor conveyed to a trustee mortgaged property to sell at public auction and divide the proceeds between the mortgagees, accounting to mortgagor for any surplus. The property being sold, plaintiff in judgment garnished the trustee, claiming the entire sum in his hands.

It was contended that this agreement merely substituted the personal promise of the mortgagor for the lien which was released by the mortgagees and made such proceeds subject to garnishment issued upon plaintiff's judgment.

The court said: "But in this case the mortgagees did not consent that the mortgagor might sell the mortgaged property and apply the proceeds of the sale on the mortgaged debt. The consent to the sale was given upon the express condition that the property was to be advertised and sold at auction; that the proceeds of the sale were to be collected by Pettigrew and applied by him in payment of the mortgage debts. This arrangement amounted to the creation of an express trust and the proceeds became a trust fund in the hands of Pettigrew. Pettigrew's authority could not be revoked by the mortgagor, nor had the mortgagor any right to or control over the proceeds of the sale, except as to any surplus there might be over and above the amount of the indebtedness secured by such mortgages."

A concurring opinion says: "The real question is, whether an agreement between a debtor and his creditors that a certain specified portion of his property shall be placed in the hands of a trustee to be converted into money in a manner not fraudulent as to other creditors, and the money so realized applied in payment of debts actually due and owing is valid as against other creditors of the debtor. The right of the debtor to prefer one set of creditors being conceded, such a mode of making payment in good faith and without any fraudulent intent is valid."

We are rather disposed in favor of the latter statement than the former. This was a disposition for a valuable consideration by way of preference of one creditor over another, and the fact that the creditors were mortgagees becomes merely an incidental circumstance. The arrangement could embrace other creditors than mortgagees as well as mortgagees.

CARRIERS—DISCRIMINATION AT COMMON LAW.—In Onondaga Gulf & C. Club, 160 N. Y. Supp. 693, decided by New York Supreme Court, the position is taken that at common law there may be enforced the principle of a maximum rate for service, but not that of an equal charge for service, and many New York cases are cited to this effect.

This means, in effect, that where regulation is enforced by law, then nothing outside of the general duty to give to a particular customer service for a reasonable reward, is demandable of a public service company except it be specified by law. We may also say that according to other decision, all intendment is against such regulation—its terms being narrowly construed. Thus in Robert v. Chicago & A. R. Co., 148 Mo. App. 96, 127 S. W. 925, it was held that in a statute forbidding the giving by a carrier of a lower rate to one than another, this did not prevent the giving of a rate to go and return for less than the sum of two single fares.

The theory of regulation of carriers is not precisely like that of the regulation of ports and wharves. Owners of vehicles do not use property in which there is common right, as do owners of wharves. There is no jus publicum in the former, but the right of regulation arises rather out of estoppel. But in either event the common law idea would be little suited to conditions in this day of sharp competition, when no one should have any advantage over another in the facilities furnished by public service companies. It would be like special favors more truly now the foundation of a monopoly than in common law days. It might be thought, however, that monopolies existed largely in those days, because kings encouraged them and their influence was less perceived then than now. But nothing may be thought to have given more irresistible impulse to the spirit that produced Magna Charta than the grant of special favors to a few.

NEUTRAL INTERESTS IN THE PRIZE COURT.

Hitherto the attention of the public has been chiefly fastened on the manner in which the Prize Court dealt with enemy ships and property, but now, as a perusal of the reports will plainly show, the intervention of the court is with increasing frequency invoked for the purpose of determining how neutral property which may have come into the war zone is affected by the allied powers' policing of the seas for the purposes of blockade. Consequently not a few novel and interesting matters are arising for decision, and we here propose to briefly indicate some of the more outstanding judgments of the court in this respect.

One of the judgments delivered early in the war was *The Miramichi*,[1] in which a cargo of wheat captured on the high seas en route for German consignees was released to American merchants, on its being proved that shipment had been made prior to the outbreak of war, and that the right of property in the cargo was still in the American consignor. That principle has been held not to apply to *post bellum* consignments.[2] In such cases the fact that the legal property in the goods has not passed from the consignor does not make the capture unlawful. Capture is regarded as delivery and the goods are treated in a court of prize as enemy property, on the theory that goods on their way to the enemy with the intention of ultimately becoming his property are, as pointed out by Lord Mansfield in *The Sally*, in 1795, to be regarded and treated as enemy property, for such matters are no longer ruled by commercial law which is concerned only with the interests of vendor and vendee, but by the law of prize which regards primarily belligerent rights.

In the case of *The Hakan*,[3] where the Crown asked for condemnation of a Swedish vessel which had been captured while engaged carrying food to a German port, the president read an important judgment on the law of contraband in relation to neutral ships. After an exhaustive review of international treaties, orders and decisions, he came to the definite conclusion, that at the present day it is a rule of international law that a neutral vessel carrying contraband, which measured by value, weight, volume or freight, forms more than half the cargo, is subject to condemnation as good and lawful prize of war.

The case of the *Bangor*[4] is interesting as defining the law as to capture of enemy ship in neutral territorial waters. In this particular case the court was not satisfied that the capture in fact took place in neutral waters, but were willing to decide the point of law raised, on the assumption that it did. Accordingly after consideration of numerous authorities, the president was of opinion that, "no proposition in international law is clearer or more surely established than that a capture within the territorial waters of a neutral is as between enemy belligerents for all purposes rightful and that it is only by the neutral state concerned that the legal validity of the capture can be questioned;" or as one of the old judges concisely and neatly put it, "neither an enemy nor a neutral acting the part of an enemy can demand restitution of captured property on the sole ground of capture in neutral waters." In the course of his judgment, the President threw out the suggestion that it might well be that the old maritime league which for long determined the boundaries of territorial waters ought to be extended by reason of the enlarged range of guns used for shore protection.

In several cases, too, interesting points were in question as to the legal nature and effect of a trade domicile. Certain of these turned on matters of fact and need

(1) 31 T. L. R. 72.
(2) The Louisiana, et al., 32 T. L. R. 619.
(3) 32 T. L. R. 639.
(4) 32 T. L. R. 590.

not be discussed here, but *The Flamenco* and *The Orduna*[5] are noteworthy. The property concerned was two consignments of copper on these vessels belonging to a German subject carrying on trade in Chile and shipped by him to Liverpool where they had been seized as prize. The German owner had left Chile before the seizure and appeared to have gone to Switzerland. It was held that although the country to which he had betaken himself was equally with Chile a neutral country, yet he had by leaving Chile lost the neutral trade domicile which he had acquired by residence there, and that he had thereby revested himself as an enemy, and therefore the goods were liable to condemnation.

The famous order in Council issued by the British Government in March, 1915, states that merchant vessels may in certain circumstances be required to enter a British port and discharge. In *The Stigstad*,[6] it was decided that where a neutral vessel had been so required, her owner had no legal right to compensation in respect of detention and consequent loss thereby incurred by him. The judgment in *The Alwina*,[7] on the other hand, was in favor of the neutral owner, the finding of the court being that where a neutral vessel with false papers has been engaged in carrying contraband intended to be delivered to the enemy, but that intention has been frustrated or abandoned, and the goods have been sold and delivered to other buyers, the vessel, if captured and seized as prize on the return voyage, is not liable to confiscation.

Lastly we may note shortly the point decided in *The Tubantia*, et al.,[8] that contraband goods sent by post are when seized as prize liable to condemnation; also that dealt with in *The Bilbster*,[9] where it was laid down that a person who pays freight on goods belonging to alien enemies has no right in the event of capture and condemnation of the cargo, to recover the freight from the ship owners or to obtain from the Crown payment out of the proceeds of the cargo.

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(5) 32 T. L. R. 53.
(6) 32 T. L. R. 472.
(7) 32 T. L. R. 494.
(8) 32 T. L. R. 629.
(9) 32 T. L. R. 35.

IRRIGATION—HAS A STATE THE RIGHT TO FORBID THE DIVERSION OF WATER FROM A STREAM FLOWING WHOLLY WITHIN THE STATE TO BE APPLIED TO A BENEFICIAL USE IN ANOTHER STATE?

In one of those interesting, clear, and tersely written opinions of Judge Ailshie, of the Idaho Supreme Court,[1] the court held that the state had this right. One reads the decisions of this Judge with both profit and pleasure and whole sermons are not infrequently found therein.

The reasons given by the Idaho court in the case just cited in upholding the right would, no doubt, be held perfectly good in any other of the states in the arid region of the West.

The court desires at the outset that it be understood that the question of diversion of water from an interstate stream into another state is not considered.

The Idaho case arose under the following circumstances:

Respondents, residents of the state of Montana, applied to the state engineer of the state of Idaho for a permit to appropriate water from a creek lying wholly within the state of Idaho. The waters were to be carried beyond the water shed of the creek into Montana and there used for irrigation purposes. The permit was issued as was another and prior permit

(1) Walbridge et al. v. Robinson, State Engineer, 22 Idaho, 236, 43 L. R. A. (N. S.) 240, 125 Pac. 812.

to another applicant for the same purpose. Subsequent to the issuance of the permit to respondents, a contest was filed by respondents and after a hearing the state engineer refused to grant any relief to either of the parties or to take any action on the matter on the ground that in issuing the permits he had exceeded his lawful authority in attempting to grant a permit for the diversion of waters of his state to be applied to a beneficial use in another state.

Thereafter the respondents represented to the state engineer that they had constructed their diversion works, as required under the application and permit, and were prepared to make proof of the completion of the work as required by law and asked that notice be given of the hearing and that they be given a certificate of the completion of their works. The state engineer refused to give notice or take any action in the matter for the reasons above stated. The district court granted a writ of mandamus to compel defendant to give notice of proof of completion of work of diversion of water from the stream and grant a certificate of completion. Thereupon the state engineer, acting under authority of the state, appealed the case.

This official's contentions on appeal were as follows:

1. That under the constitution and laws of Idaho, the waters of that state belong to and are owned by the state and that the state holds the title to all the public waters in common for the benefit of all the people of the state.[2]

2. That this statement of the law is only a written expression of what the law has always been with reference to the public waters of the state and that, therefore, it does not intend to make new law.

The court, in its support of these two contentions, says that it is clear that the title to the public waters of the state is vested in the state for the use and benefit of all the citizens of the state, under such rules and regulations as may be subscribed from time to time by the law making power of the state. That this is not, however, an interest or title in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity. Comparison is then made between running water and *ferae naturae* and cites the following cases: "Water and oil, and still more strongly gas, may be classified by themselves . . . as minerals *ferae naturae*. In common with animals, and unlike other minerals they have the power and tendency to escape without volition of the owner."[3] "The members of the community have a common interest in the water."[4] In speaking of the relative rights of the individual and the state to water, light and air, it is said: "It is . . . (difficult) to understand how a . . . (person) can be said to have property in water, light, or air, of so fixed and positive a character as to deprive the sovereign power of the right to control it for the public good and convenience. Such a right exists as to individuals and it cannot be interfered with by them. But the state, in virtue of her right of eminent domain, has the paramount right to control and dispose of everything within her limits which is not

(2) Art. 15, Sec. 1, Constitution of Idaho, Sec. 3240, Revised Codes of Idaho; Art. XVI, Sec. 5, Constitution of Colorado; Art. XVI, Sec. 2, Constitution of New Mexico; Rev. Stats., Ariz., '01, Sec. 22, 4174; Acts of 1907, as amended by Acts of 1909, Nevada; Compiled Laws of Utah, 1907, Sec. 1288.

(3) Westmoreland and C. Natural Gas. Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724.

(4) Katz v. Walkinshaw, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. R. 35, 70 Pac. 663, 74 Pac. 766.

absolute and private property, to the promotion of the public good."[5]

It will be found that the authorities quite uniformly class wild animals, fish, water, gas, light, and air as things of the "negative community," or the property of no one, and that they are consequently *res communes* (those things which, though a separate share of them can be enjoyed and used by everyone, cannot be exclusively and wholly appropriated), and subject to regulation and control of the state in sovereign capacity.

In the argument in opposition to this right of the state to forbid the taking of water from streams flowing wholly within a state out of the state, respondents lay special stress on the case of Bean v. Morris, 221 U. S. 485, 55 L. ed. 821, 31 Sup. Ct. Rep. 703, to which appellants reply with Hudson Co. Water Company v. McCarter 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560. The Court explains the difference in these two cases in the following manner:

"It will be observed that Bean v. Morris is dealing with an interstate stream which is the particular subject which we said in the outset we were not dealing with in this case. The question decided in that case arose out of dispute between Morris and Bean as to priorities of appropriation of waters of a tributary of the Big Horn River flowing through Wyoming and Montana. The Court held that, since both Wyoming and Montana were carved from the arid region, and the law of the priority of appropriation prevailed in that territory prior to the formation of the states, the Court would assume, in the absence to the contrary, that the states still intended that priority of right by appropriation and diversion should prevail on interstate streams irrespective of state boundary lines. The Hudson County Water Co. case was dealing with waters of the Passaic River, a stream situated wholly within the limits of the state of New Jersey. The Court held that the state might prevent the diversion of waters of that stream to a point beyond the limits of that state, and that riparian proprietors could not lawfully contract with a water company so as to authorize such company to pipe the waters of the state into the state of New York. The Court likened that case in principle to the case of Geer v. Connecticut, *ubi supra*, (161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600) and held that the state might retain its natural resources for the benefit of its own people, and might prohibit their being transported beyond its territorial jurisdiction. Among other things, the Court said: "We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon a nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to esthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good and what it has it may keep and give no one a reason for its will."

The Court next takes up the question of what the effect is of absence of express legislation to prohibit the diversion of waters of the state into another state for irrigation purposes.

It is conceded at the outset that there is no express legislation to that effect. Appellant contends that its absence does not grant or confer the right, and that there is no presumption arising by the state's silence on the subject of the diversion of waters beyond the state's jurisdiction. Respondents contend, on the other hand, that in the absence of express legislation to grant the right, the right may be exercised and in doing so there can be no viola-

(5) Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126.

tion of any provision of the constitution or statute.

These propositions, say the Court, give rise to a consideration of the nature of state legislation, both as to the class of subjects to which it applies and the jurisdictional limits in which it can be executed.

"Prima facie, every statute is confined in its operation to the persons, property, rights and contracts which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect."[6] "The legislative authority of every state must spend its force within the territorial limits of the state."[7] "No law has any effect, of its own force, beyond the limits of its sovereignty from which its authority is derived."[8]

"In the light of these authorities," says the Court, "and the fundamental reason and principle on which they rest, it would seem necessary for anyone who claims a right under the laws of the state, which right is to be exercised under the jurisdiction thereof, to rest such right upon some specific legislative grant of authority. In the case at bar a right is urged to enjoy the use of state property, or a natural resource of the state beyond the jurisdictional borders of the state and within the confines of another state. A gift or grant of state property or a public franchise, or a right which must emanate from the sovereignty representing the whole people, ought not to arise from a mere inference or failure of the sovereignty to speak on the subject. On the other hand, a failure to speak on the subject or to confer the right in specific terms ought to be construed in favor of the state and against those claiming the right." To the same effect is found in Endlich on Interpretation of Statutes, p. 497 and Black on Constr. & Interpretation of Laws, 1896, p. 109.

The laws of the state of Idaho, while it confers the right to regulate the use of waters within the state, to establish rates, control the method of distribution, prevent wrongful or wasteful distribution and obstructions to its flow, has no authority to go outside of its boundaries to exercise these rights. Clearly then, without reciprocal legislation with the state of Montana recognizing the right of Idaho to go into the state of Montana to exercise its water regulations there was no authority for the diversion and appropriation of the waters of the state of Idaho for application to a beneficial use in Montana.

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(6) Black on Constr. and Interpretation of Laws, p. 91. Endlich on Interpretation of Statutes, p. 233.

(7) Cooley on Constitutional Limitations, 7th ed., p. 176.

(8) Hilton v. Guyot, 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139.

NUISANCE—INDEPENDENT TORTFEASORS.

KEY v. ARMOUR FERTILIZER WORKS et al.

Court of Appeals of Georgia. July 27, 1916.

(Syllabus by the Court.)

89 S. E. 593.

Where two distinct corporations, through their respective separate manufacturing plants, discharge noxious and poisonous gases into the atmosphere, which invade the premises of adjacent residents and cause an actionable nuisance, the corporations aer not jointly liable for damages, where there is no common design or concert of action, but each is liable for its proportion of the damages only.

BROYLES, J. This was a joint suit for damages against two separate and distinct corporations, with separate and distinct plants, engaged in the manufacture of fertilizers. The plaintiff's petition alleged that the plants of both defendants discharged therefrom noxious and poisonous gases into the atmosphere, and that these gases invaded his premises and poisoned and befouled the air therein to such an extent as to cause sickness and death in his family, and to otherwise injure and damage

him. The defendants interposed a demurrer to the petition, and the court sustained grounds 2, 3 and 4 thereof. These grounds were as follows:

(2) "Because neither said petition nor any count thereof states facts sufficient to constitute a joint cause of action against these defendants."

(3) "Because in said petition and in each count thereof there is an improper joinder of causes of action, to-wit, a separate and distinct cause of action in favor of the plaintiff against the Armour Fertilizer (Works), and a separate and distinct cause of action in favor of the plaintiff against Morris Fertilizer Company."

(4) "Because in said petition and in each count thereof there is an improper joinder of parties, for that the Armour Fertilizer Works, if liable at all, is liable only for its own acts and for the damages resulting therefrom, and the Morris Fertilizer Company, if liable at all, is liable only for its own acts and for the damages resulting from such acts, and neither defendant is liable for the acts of its codefendant or the damages resulting from the acts of its codefendant."

In its order sustaining these grounds of demurrer, the court provided that the plaintiff should have 10 days within which to elect which one of the defendants he would proceed against, and that in the event of a failure to make such election the case should stand dismissed. The 10 days having expired without the plaintiff complying with the order, the case stood automatically dismissed, and the plaintiff excepted.

In our opinion the ruling of the court was correct. The petition showed that the two defendants were separate and distinct corporations, and that they operated separate and distinct plants, and no concert of action, or common design, or community of interest was shown. Conceding that an actionable nuisance appeared, and that both of the defendants contributed to this nuisance, each company was liable for its proportionate part of the damage only. This precise point seems never to have been passed upon by an appellate court in Georgia, but it has been definitely settled in other States. In City of Mansfield v. Bristor, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Onn. Cas. 767, the Supreme Court of Ohio held that:

"Where different parties discharge sewage and filth into a stream, which intermingle and cause an actionable nuisance, they are not jointly liable for damages when there is no common design or concert of action, but each is liable only for his proportion of the damages."

In Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93, the ruling of the Supreme Court of Tennessee was in substance that:

"Where two distinct corporations in proximity to each other operate their respective and separate plants for reducing and converting copper ore into metal nuggets or commercial copper, from each of which are emitted immense volumes of noxious, foul and poisonous smoke and gases, which afterwards indistinguishably mingle, commingle, and intermingle in a cloud of noxious, deadly and poisonous vapors, creating an actionable nuisance, but there is no common ownership or operation of the plants, no community of interest, no common design, purpose, concert, or joint action, a suit by an adjoining or adjacent property owner against them jointly for damages caused by their wrongful acts so separately committed is not maintainable."

See, also, to the same effect, 38 Cyc. 484, 485; Schneider v. City of Augusta, 118 Ga. 610, 45 S. E. 459; Howe v. Bradstreet Co., 135 Ga. 564, 69 S. E. 1082, Ann. Cas. 1912A, 214.

It is true that the Supreme Courts of West Virginia, Indiana, Texas, and possibly some other States, have made contrary rulings, to the effect that under such circumstances independent tortfeasors are jointly liable. We think, however, that this view is unsound and that the weight of authority is against it. At any rate, the decisions of our own Supreme Court, by which we are bound, are, in principle at least, to the effect that in such cases a joint action against independent tortfeasors will not lie.

It is unnecessary to consider the assignments or error contained in the cross-bill of exceptions.

Judgment affirmed on the main bill of exceptions; cross-bill dismissed.

NOTE.—*Exceptions to the Rule of Concert to Make Tortfeasors Jointly and Severally Liable.*—The instant case proceeds upon the theory that concert of action or common design or community of interest on the part of several tortfeasors is necessary to make all jointly and severally liable for a wrongful result. It is a little difficult to see, that the presence of a common design or of a community of interest necessarily would supply the missing link for joint liability, in the absence of concert of action, if that is necessary in any case. The having either a common design or a community of interest might be purely fortuitous and the knowledge of its

existence might be unknown to the tortfeasors, or known to one and not to the other.

What seems to us the beter rule is as laid down in 21 Am. & Eng. Ency. Law, 2nd ed., p. 496, that: "Where the negligence of two or more persons, acting independently, concurrently results in injury to a third, the latter may maintain his action for the entire loss against any one or all of the negligent parties, it not being essential to the maintenance of a joint action against several for negligence that they should be engaged in a common enterprise or sustain any relations whatever between themselves."

In Sherman & Redfield on Negligence, 4th ed., § 122, it is said that: "Persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert or united in causing a single injury, even though acting independently of each other."

Cooley on Torts, p. 79, says: "If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally for the injury."

In Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. ed. 266, it is said that: "Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other." It seems to us somewhat illogical to make the right of action depend upon inability to show the proportion of damage by either, but this case shows that, at least, sometimes there may be joint action against independent tortfeasors each acting separately.

Day v. Louisville Coal & C. Co., 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167, presents an extreme illustration of application of the doctrine of joint and several liability of independent tortfeasors. Thus it was said: "In defense the defendant showed that various other coal and coke works, separate and distinct from that of the defendant, carried on by other operators, threw their refuse into the same creek and river, and that the injury to the plaintiff's land came as well from the acts of others as from the defendant, and that plaintiffs cannot maintain their action against the defendant and make it responsible for damage which came from the acts of others. It contends that it is not liable further than the damage caused by its act. There are some authorities that support this proposition, but the authorities against it very decidedly preponderate, and they harmonize with right reason and the established law of centuries. This damage comes from tort, not contract, and it is a rule of law as old as the hills that in a tort all participating or contributing in the wrong, working the injury, are liable and any single one is liable. One can be sued, or more can be sued."

In Allison v. Hobbs, 96 Me. 26, 51 Atl. 245, it was ruled that where persons acting separately and independently caused a separate and distinct injury, in causing a separate and distinct arrest of the same person, they could not be sued jointly, but, *arguendo*, it was said that if their several independent acts directly contributed to produce a single injury, each being sufficient to cause the whole and it is impossible to distinguish the part caused by each, they may be sued as joint tortfeasors." This it is seen is different from a case where only part of the damages is caused by each one; but we do not see that this ought to make any difference in the principle involved. There is no more concert in one case than in the other.

In West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879, it was ruled that even if it may be conceded to be true that the principle declared in the instant case be true there "a distinction, however, is recognized between such acts which are wrongful only because injurious to individual rights and those which combine and constitute a public nuisance. In the former class of cases each separate wrongdoer is chargeable with his own acts alone, in the absence of a joint purpose among participants; in the latter, each may be answerable in a joint and several action, not only for what he himself does, but likewise for the acts of those, who with him violate public as well as private rights." As supporting this view are cited Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603. These show distinctions as to the general rule and we would doubt very greatly, even if the general rule were good law, that they are soundly drawn.

Notwithstanding the statement in Day v. Louisville Coal, etc., Co., *supra*, that a preponderance of cases supports its conclusion, this seems not true, but, on the contrary, they largely preponderate the other way.

The proposition that each of independent tortfeasors is liable only for his proportion of injury has been ruled in England and decision shows that it has been vigorously combatted right along.

While the great weight of authority sustains the instant case, we greatly doubt its correctness, and it certainly seems opposed to the text in authors above cited. A valuable note on the subject is found in 118 Am. St. Rep., beginning at page 868. C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF THE MISSOURI BAR ASSOCIATION.

The thirty-fourth annual meeting of the Missouri Bar Association convened in the city of St. Louis on September 26th, 1916, and concluded its labors on the 28th of the same month.

We use the term "labors" advisedly, since our experience does not recall a session where the members kept themselves so assiduously to the self-imposed task of lawmaking as did the three hundred delegates attending this meeting.

The first real clash of arms occurred over a motion to supersede the annual report by a

bar association quarterly edited by the executive committee. After serious misgivings had been expressed with respect to the financial difficulties of such an undertaking and some opposition to the abandonment of the annual report, the whole matter was committed to the executive committee with power to act.

But for real trench warfare in days of peace we never witnessed anything more exciting than the sharp conflict that developed over the adoption of the recommendations for reforming the rules of pleading and practice, proposed by a Special Committee on Remedial Procedure, appointed at a previous meeting of the association, and of which Judge David H. Harris, of Fulton, was chairman.

In order to show the prodigious labors of Judge Harris' efficient committee, as well as the almost impossible task it "put up" to the association, it should be stated that the report of this committee covered 100 pages of ordinary law book text. The recommendations proposed eight bills, amending or completely changing by substitution 154 sections of the Missouri Code of Procedure.

The first shot fired at the proposed recommendations was a motion to substitute for the committee's suggestions a bill authorizing the Supreme Court of Missouri to make rules of pleading and practice, with power to abrogate or amend the present statutory provisions of the code and to adopt such new rules from time to time as to such court might think proper.

The committee was hardly prepared for this flank attack and great progress was made by the opposition before the committee finally rallied its forces and regained the lost ground by the argument that a half loaf was better than none and that the arduous labors of the committee should not be wasted by the proposal of a scheme so impossible of attainment at the present time. Professor Manley O. Hudson, of the University of Missouri, shelled the enemy's position with arguments showing the utter futility of haphazard tinkering with statutory codes of procedure, the inherent weakness of all statutory rules governing procedure, and the elasticity of court-made rules. He closed with the statement that five States had already adopted the English plan of court-made rules of procedure and that the way of progress lay along that line. But the committee had organized its defenses too strongly and pleaded successfully for the adoption of its recommendations, leaving for the future to develop a sentiment for that system of court-made rules, which every lawyer knew to be the most desirable.

The convention then proceeded to use up two good days in considering these 154 sections, and at the close of the debate there was probably not one delegate who was not ready to admit that making or amending rules of procedure was no easy task, even for lawyers, and could hardly be done in two days of even the most painstaking study. Former Congressman Robert Lamar of Houston, and Hon. Fred. W. Lehmann of St. Louis succeeded in having stricken out or amended certain sections of the proposed recommendations, but both gentlemen finally declared that the Supreme Court and not the legislature should determine questions so difficult and technical in their nature.

The third day of the convention was devoted to the hearing of prepared papers and addresses. Hon. F. P. Divelbiss, of Richmond, spoke on "Some Needed Changes in the Rules of Evidence," wherein he ridiculed the idea of making dying declarations admissible in homicide cases, but denying their admissibility in other cases of much less importance. Dean Eldon R. James, of the University of Missouri, Law Department, spoke on "The Changing Laws."

Our good friend, Mr. Herbert Harley, of Chicago, secretary of the American Judicature Society, gave a learned resumè of modern experiments of "Commercial Arbitration." His address showed an intimate acquaintance with the rapid development of this idea in England, and his paper is therefore a very valuable contribution to the science and literature of the law on this subject.

Hon. Henry D. Clayton, United States District Judge, Alabama, spoke in favor of "Uniformity of Procedure at Law in Federal Courts." He explained the bill proposed by the Committee on Uniform Procedure of the American Bar Association, which gives to the Supreme Court authority to make rules governing pleading and practice at law in the federal courts. He showed the utter impossibility of following the ever changing State rules and extolled the advantages of a uniform code to be learned once for all and to be in force everywhere in federal courts from Maine to California. He then "dipt into the future" and saw the possibility of State legislatures abandoning the rigid statutory codes and giving to their highest tribunals the same authority now sought of Congress for the Supreme Court of the United States; and still further into the future, but not so far as to be impossible of realization in the lifetime of many of the

younger members of the profession, he saw the possibility of every supreme tribunal so modifying its own rules of procedure so as to bring them into substantial uniformity with the federal rules, thus realizing the wildest dreams of the lawyer that some day he could learn one system of procedure that would enable him to practice law anywhere in the country without fear of local traps and pitfalls, a system elastic, reasonable and simple.

The officers elected for the ensuing year were as follows: Hon. James H. Harkless, of Kansas City, President; Mr. George H. Daniel, of Springfield, Secretary, and Mr. A. Stanford Lyon, of Kansas City, Treasurer.

A. H. R.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 111.

Auctioneer; Fees; Relation to Client—Lawyer's receipt from auctioneer conducting partition sale, of part of his commission—disapproved.

A, an attorney, represents an estate, a portion of which is real estate. In partition proceedings an order of sale is made, and A, representing substantially all parties and particularly the plaintff in the partition proceedings, puts the matter into the hands of an auctioneer. The property is sold at a satisfactory price, and the auctioneer makes the usual charge. After the transaction is completed, the auctioneer, who has previously said nothing about the matter, asks A to accept a check for one-half of his commission, stating that he does so in appreciation of A's bringing the business to him.

(a) Does A's duty to his clients prevent him from accepting the check?

(b) If so, would the objection be removed if A inquired of his clients whether they had any objection, and they answered that they had not?

(c) If he has no duty to his clients, is there any other consideration which should prevent him from accepting?

ANSWER No. 111.

In the opinion of the committee, the lawyer's duty prevents him from accepting check without the knowledge and consent of his clients; but irrespective of his duty to his clients, the sharing of the auctioneer's fees is beneath the proper professional dignity.

QUESTION No. 112.

Fees; Relation to Client; Relation to Third Person—Charge by attorney for estate, as condition for securing extension of existing mortgage held by estate as investment; its proper basis and limitations—participation by such attorney in brokerage upon policies of insurance upon the mortgaged property; its limitations—insistence by such attorney upon such brokerage as condition of permitting mortgagor to select insurer—disapproved.

(a) An attorney represents an estate which is the mortgagee; the mortgage expires; there is no question raised as to the sufficiency of the real estate security but the attorney for the estate insists on a fee of $200 for his services as a condition for the securing of an extension of the mortgage. Is there anything improper or unethical under such circumstances in the charge of the attorney?

(b) The attorney insists that the insurance policies be taken out by him on behalf of the mortgagee and rejects policies taken out by the mortgagor. The attorney seeks to secure the brokerage on the insurance policies or a portion thereof. Is the attorney justified in this practice if there is no provision in the mortgage giving the mortgagee the right to take out the insurance? If there is such a provision, is it ethical for the attorney to participate or share in the commission or brokerage secured through the issuance of such insurance policies? Would it vary the situation if the attorney had an insurance brokerage business connected with his office and conducted under a different name? Under any circumstances, would the attorney be justified in offering to permit the mortgagor to take out the insurance if the attorney received a part of the brokerage or commission, and would not such practice be unethical?

ANSWER No. 112.

In the opinion of the committee:

(a) It is not proper for the attorney to demand or receive any compensation for inducing his client to grant an extension, nor as a condition of securing an extension. But there is no impropriety in the attorney demanding and receiving as compensation for his services actually rendered in the transaction a reasonable amount to be paid by the mortgagor, commensurate with the service, and depending upon the circumstances of the particular case.

(b) Questions of statute law which may be involved, are not considered by the committee. Assuming that the course suggested involves no violation of statute, the committee is of the opinion that the attorney should not use his position arbitrarily or to oppress the mortgagor. The attorney's conduct should be dic-

tated by his client's interests and not by selfish motives. The attorney is not justified in rejecting a policy so that he may secure the brokerage or a part of it, nor is he justified in demanding a portion of the brokerage as a condition of allowing the mortgagor to place the insurance.

BOOK REVIEWS.

BURDICK'S CASES ON THE LAW OF PUBLIC SERVICE.

Prof. Charles K. Burdick, professor of the law of public service in Cornell University, presents in a very excellent book cases on the Law of Public Service arranged in seven different chapters, with an Appendix giving "The Act to Regulate Commerce as Amended and the Elkins' Act."

The chapters above spoken of are divided into general heads as follows: The Bases of the Duties of Public Service; The Service to be Rendered; The Right to Make Rules for the Service; Rates; Discrimination; Duty to Furnish Adequate Facilities, and Withdrawal from Public Service.

The selections made extend from the time of the Year Book in our Common Law to late cases in American decisions. Those cases considered give a fair view of the law as to what are common callings and why to them is annexed the duty of serving all who apply to them for service; why the public have an interest in the service to be rendered; why this gives a right of regulation and control, and why there are limitations upon the right of withdrawal from service. These cases are well selected and deserve to be read by the lawyer and the student.

This book is of excellent typography and paper, bound in brown buckram and is published by Little, Brown & Company, Boston, Mass., 1916.

VOORHEES' THE LAW OF PUBLIC SCHOOLS.

A book on the above subject by Mr. Harvey Cortland Voorhees, of the Boston bar, treats this subject well, and shows the regulation and control of public schools under the various state enactments. It speaks of the duties and responsibilities of teachers, the rights and duties of pupils and the regulations either directed by statute or within the discretion of the school management. It also speaks of religious garb of teachers and the right to preserve the health of pupils by such a regulation as vaccination, and also the right to forbid secret societies among students. The subject is well treated and the propositions in the text are well supported by authority down to date. The work is attractive in form and type and hails from the publishing house of Little, Brown & Company, of Boston, Mass., 1916.

ALLEN'S EVOLUTION OF GOVERNMENTS AND LAWS.

Much labor must necessarily have been expended to produce a work so far-reaching in its scope as the title of the work we are now reviewing. The author, Mr. Stephen H. Allen, proposes in his preface to study the experiences of the various peoples of the earth and extract from them the broad general principles which have led them step by step to their present level of civilization. The author hopes that the book may have a practical value in being "helpful in the work of framing constitutions and formulating laws."

The author in his introduction treats of the general functions of law and government and their evolution at least such as have a common history in all nations. Thus he treats of parental authority, public regulation of the family, crime and punishment, legislative morality, legislative expedients, judicial functions, executive functions, checks and balances of governmental powers, general purposes of government.

Then follow 26 chapters dealing with the primitive law and customs of every great nation or people in Europe, Asia and America, followed by a long chapter entitled, "Generalizations." A very valuable part of the work is the appendix, which contains The Code of Hammurabi, the Twelve Tables, the Code of Manu, the Institutes of Justinian, the Penal Code of China, the Civil Code of France, the Civil Code of Germany, the Magna Charta and the Constitution of the United States. Of course the Codes of France and Germany are given in very condensed form.

The work is somewhat too pretentious in its title and introduction; it attempts to cover ground which would seem to require ten or more such volumes as the one before us. Nevertheless the book should serve as a valuable introduction to a study of comparative jurisprudence.

Moreover, the author interposes his own personal standards of morality and government

too frequently in the discussion of the laws and customs of other nations. He seems not to realize that in such scientific investigations the personal opinions of the author with respect to the expediency or morality of national customs are quite out of place and sometimes very provincial in their severity. For instance, in commenting on the system of polygamy under Mohammedan law, the author steps aside to declare that monogamy produces less immorality than polygamy. Such a statement was not only unnecessary but its correctness is sharply disputed by Mohammedan publicists, who contend that immoral conditions existing in America under liberal divorce laws would not be tolerated in Egypt or Arabia. Before any student and especially the American student can properly prepare himself for a study of comparative laws and customs he must rid himself of the egotistical assumption that American laws and customs are the best for all nations and therefore the standards for the whole world.

Mr. Allen's work, however, is very interesting and will please the general reader who wishes in a small compass to cover the whole field of comparative law and trace the origins of many of the principal institutions of society in the various nations of the world.

Printed in one volume of 1221 pages, bound in blue cloth and published by the Princeton University Press, Princeton, N. J.

LUST ON THE ACT TO REGULATE COMMERCE.

Mr. Herbert C. Lust of the Chicago Bar, co-author of Digest of Decisions under the Interstate Commerce Act, presents a very readable book in which are treated one by one the sections of the Interstate Commerce Act, with citation of decisions both by the courts and the Interstate Commerce Commission.

The observations of this author are somewhat free and discursive and are very far from resting on cited authority, but they are not of the dogmatic style and furnish food for reflection to the careful reader and abound with useful suggestion. On the whole it is a very readable book.

By way of appendix, there are added many acts of Congress and reports relating to commerce as published by the Interstate Commerce Commission, placing under one cover material of convenient reference in this important subject.

The volume is bound in cloth of excellent paper and typography and hails from the La-Salle Extension University, Chicago, 1916.

HUMOR OF THE LAW.

A Connecticut man tells of the case of one Silas Ketchum, the champion liar of a village in that state:

It appears that one day Si was arrested and brought before the local justice for chicken stealing.

"Jedge, your honor," he said, "I plead guilty on the advice of my lawyer."

But the justice gazed at the noted prevaricator and rubbed his chin dubiously.

"I dunno," he said, "I dunno. I guess—well, Si—I guess I'll have to have more evidence before I sentence ye."—*Kansas City Bar Monthly.*

A peacable looking Irishman had been brought into a suburban police station on some petty charge. He pleaded innocence.

"Is there anybody here who can vouch for your respectability?" said the examining officer.

Patrick singled out the head of the small police force.

"He can," he said.

"Me?" exclaimed the policeman. "Why, I don't know the man."

"Exactly," said the accused. "I have lived in this place twenty years and the police don't even know me, so I can't be such a bad lot."—*New York Times.*

If Patrick Devlin, of Lawrence, Mass., were not such an impatient man he would be free to-day. Instead he is locked up at the state farm, Bridgewater, for an indefinite period.

Patrick was on trial at Salem before a jury, charged with drunkenness. All the evidence was in and the jury retired. After a while Patrick became fidgety. The longer the jury stayed out the more impatient he became.

Finally he arose and said:

"Your honor, I would like to change my plea from not guilty to guilty."

The change was noted by the clerk. Suddenly the door opened and the jury trooped back into court.

"What say you, Mr. Foreman and gentlemen of the jury, is the defendant guilty or not guilty?" asked the clerk.

"Not guilty!" replied the foreman.

Patrick was crestfallen. Having changed his plea, he had to take his medicine. Although the jury said that he was not drunk, Patrick said that he was drunk, and so the court decided that he ought to know better than the jury.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Accord and Satisfaction**—Consideration.—The rule that an agreement to accept a smaller sum in full payment of a debt not due is not void as without consideration does not apply where the creditor is to receive nothing in return for discharging the debt.—Gilla v. Robbins, Minn., 158 N. W. 807.

2. **Adverse Possession**—Defined.—To constitute adverse possession, the person occupying the land must appropriate it to some purpose in order to support the statute.—O'Hanlon v. Morrison, Tex., 187 S. W. 692.

3. **Animals**—Agister's Lien.—Right of agister in Kansas to take possession of cattle to enforce his lien was not destroyed by surreptitious taking of cattle out of Kansas into Missouri.—Sample v. Verner-Kelly Live Stock Commission Co., Mo., 186 S. W. 1125.

4.——Instructions.—In action for killing dog, charge that, if the dog was not worth greatly more than a goat, and reasonably prudent man would conclude it was necessary to kill the dog to save the goat, verdict should be for defendant, was not error.—Kershaw v. McKnowon, Ala., 72 So. 47.

5. **Attachment**—Estoppel.—Where plaintiff's property was attached for a third person's debt, and plaintiff gave an officer's receipt, and later delivered the property to him on demand, plaintiff was not estopped by contract to assert ownership by replevin, the estoppel continuing only during the terms of the receipt.—Lester v. Ladrigan, Conn., 98 Atl. 124.

6. **Bankruptcy**—Insurance.—That trustee in bankruptcy may recover on a fire policy as having passed to him as part of bankrupt's estate, a showing of facts rendering void the assignment of the policy by bankrupt, though within four months of his adjudication, is necessary.—Smith v. Retail Merchants' Fire Ins. Co. of South Dakota, S. D., 158 N. W. 780.

7.——Preference.—Where bank filed claim with referee in bankruptcy of automobile company, which had deposited draft for price of cars shipped with bank as security, objections being filed by trustee, and bank not thereafter withdrawing appearance, referee's order, adjudicating that transaction between bank and company, constituted preference, was binding in action against railroad for conversion of automobiles.—Davenport Sav. Bank of Chicago, R. I. & P. Ry. Co., Iowa, 158 N. W. 737.

8.——Reimbursement.—Purchasers of realty belonging to a bankrupt sold for taxes and special assessments are entitled to be reimbursed out of general assets of bankrupt on cancellation of their certificates under Bankr. Act, § 64a.—Dayton v. Stanard, U. S. S. C., 36 S. Ct. 695.

9. **Banks and Banking**—Bill of Lading.—A bank forwarding a draft for collection with bills of lading is entitled to an accounting for the avails of the draft and to resist action for recovery back of money received from correspondent bank, though it may have a guaranty against loss from drawer of draft.—Russo-Chinese Bank v. National Bank of Commerce of Seattle, Wash., U. S. S. C., 36 S. Ct. 652.

10.——Receivership.—Owner of money fraudulently obtained and used in business of insolvent bank by cashier is not entitled to repayment by receiver in preference to other creditors, except so far as assets in hands of receiver were larger by reason thereof.—Arnold Inv. Co. v. Citizens' State Bank of Chautauqua, Kan., 158 Pac. 68.

11.——Sale.—Where in making sale of bank stock, president of bank agreed to pay to purchaser notes held by bank, to be selected by purchaser, contract may be enforced after purchaser has made selection.—Galt v. Hildreth, Neb., 158 N. W. 366.

12. **Bills and Notes**—Acceptance.—In view of Negotiable Instruments Law, § 134, a letter from the drawee to the drawer accepting a draft would not be binding in favor of a bank which never saw the letter or advanced money relying upon it.—Jones v. Crumpler, Va., 89 S. E. 232.

13.——Assignment.—Where a note executed by defendants was assigned to plaintiff after maturity, and notice of the assignment was given to the named defendant by the assignor, the note was enforceable against the defendants before payment by them to the payee.—Steele v. Bradley, Mo., 186 S. W. 1171.

14.——Holder in Due Course.—Assignment of notes, made long before maturity to a bank, as collateral for a loan, without notice of any equities existing between the original parties, rendered the bank a holder in good faith.—McLean County Bank v. Brown, Mo., 187 S. W. 785.

15. **Brokers**—Abandonment.—Where plaintiff as broker contracted to sell defendant's business, and after making unsuccessful efforts abandoned the project, a subsequent sale to a former prospective customer, whom plaintiff had introduced to defendant, did not revive the agreement so as to make defendant liable to plaintiff for a commission.—Cole v. Carruthers, Wash., 158 Pac. 75.

16.——Procuring Cause.—A broker employed to sell land is entitled to his compensation if he brings the parties together and a sale is afterwards effected by the seller himself.—Keller v. Jones & Weeden, Ala., 72 So. 89.

17.——Purchase from Principal.—It is not impossible for one who is an agent to afterwards become a purchaser from his former principal; but the law will scrutinize such transactions when attacked, and will see that before such purchase is allowed to stand the contract of agency is terminated.—Williams v. Johnston, Mo., 186 S. W. 1163.

18. **Carriers of Goods**—Conversion.—In action by bank against railroad for conversion of automobiles shipped by company which deposited draft for price with bank as security and became bankrupt, papers and files in bankruptcy proceedings against shipper of cars should have been admitted.—Davenport Sav. Bank v. Chicago, R. I. & P. Ry. Co., Iowa, 158 N. W. 737.

19.——Discrimination.—Imposing charges for switching shipments of grain to industries located on tracks of a terminal company, no charge being made for switching like shipments on other industrial tracks owned by principal railroad companies, is unjust discrimination.—Minneapolis Civic & Commerce Ass'n v. Chicago, M. & St. P. Ry. Co., Minn., 158 N. W. 817.

20.——Evidence.—In action for loss of wheat in transit, where amount by weight at destination is shown, testimony that wheat was loaded into car at shipping point by hopper scale showing bushel weights was competent.—State Ele-

vator Co. v. Great Northern Ry. Co., Minn., 158 N. W. 399.

21.——Liability.—An express company which acts as agent for the owner in arranging for the transportation and storage of goods without having possession or transporting them as a common carrier is not liable as a common carrier for loss and damage.—Lilles v. American Express Co., Mo., 186 S. W. 1102.

22.——Rates.—It is duty of carrier to inform consignee of correct freight rate according to schedules on file with Interstate Commerce Commission or State Railroad Commission and on payment or tender of amount due to deliver freight.—Emerson v. Central of Georgia Ry. Co., Ala., 72 So. 120.

23.——Secondary Liability.—An express company, accepting in London an automobile to be shipped to New York, which boxed the same, taking from steamship bill of lading limiting liability to $100, held secondarily liable to the owner, where car was damaged through the negligence of stevedores of the steamship company in discharging the cargo.—Reid v. Fargo, U. S. S. C., 36 S. Ct. 712.

24. **Carriers of Passengers**—Free Pass.—Under orders of Railroad Commission providing for free passes on terms provided by Hepburn Act and act to regulate commerce, as amended June 18, 1910, stipulation in free pass issued to employe against liability is not an exception to general rule as to its validity.—Wright v. Central of Georgia Ry. Co., Ga., 89 S. E. 457.

25.——Negligence.—If the wire which caught deceased was accidentally attached to the street car while in operation, and operatives had no knowledge of it, and were not negligent in failing to discover it, verdict could not be for plaintiff on account of the operatives' negligently allowing the wire to become attached to the car.—O'Brien v. Birmingham Ry., Light & Power Co., Ala., 72 So. 343.

26. **Chattel Mortgages**—Lien.—Though chattel mortgage, unless duly registered, may be declared void by statute, notice is equivalent to registration, and subsequent incumbrancer or purchaser with notice cannot avoid its lien.—Neely v. Reynolds, Ala., 72 So. 124.

27. **Commerce**—Carmack Amendment.—Carmack Amendment to Act of Feb. 4, 1887, § 20, precludes application to interstate shipment of a local law investing innocent holder of bill of lading with rights not available to shipper.—Atchison, T. & S. F. Ry. Co. v. Harold, U. S. S. C., 36 S. Ct. 665.

28.——New Shipment.—Carload shipped from Yanka, Neb., consigned to Topeka, Kan., care of "Santa Fe for shipment" to order of a grain company at Kansas City moved in a continuous interstate commerce shipment from its departure to termination over Santa Fe Railroad from Topeka, Kan., to Elk Falls, Kan., so that its delivery to Santa Fe at Topeka was not a new shipment in intrastate commerce.—Atchison, T. & S. F. Ry. Co. v. Harold, U. S. S. C., 36 S. Ct. 665.

29.——New Shipment.—Where a manufacturer shipped by railroad to a point in the same state goods sold and to be delivered there to another railway company, billing them at the purchaser's request to a point on the latter's line in another state to which they were transported by the purchasing railroad as its own goods, the shipment, being continuous, was "interstate."—Louis Werner Sawmill Co. v. Kansas City Southern Ry. Co., Mo., 186 S. W. 1118.

30.——Safety Appliances.—2 Rev. Codes Idaho, §§ 6909, 6926, making willful conduct causing collision of trains and death of a human being a criminal offense, do not affect right of motorman of interstate interurban railway to recover for injuries in a collision by defective brakes under Employers' Liability Act and Safety Appliance Act.—Spokane & I. E. R. Co. v. Campbell, U. S. S. C., 36 S. Ct. 683.

31. **Constitutional Law**—Lawful Pursuit.—Laws 1915, c. 170, § 2, restricting sale of anti-hog cholera serum, is unconstitutional restraint of right to buy and sell and to adopt and follow any industry or pursuit not injurious to community.—Hall v. State, Neb., 158 N. W. 362.

32.——Political Question.—Whether a state has ceased to be republican in form within Const. art. 4, § 4, because it has made the referendum a part of the legislative power, is a political question for Congress to determine.—State of Ohio ex rel. Davis v. Hildebrant, U. S. S. C., 36 S. Ct. 708.

33. **Corporations**—Assignment.—The receiver of an insolvent corporation, which occupied part of a building leased to its organizer and president before its incorporation, held not entitled to subrentals collected by the lessee, where no assignment of the lease, or agreement to account for the subrentals to the corporation, was proved.—Downs v. Gunther, Md., 98 Atl. 138.

34.——Promoter.—A contract apparently fair, allowing a promoter, for services in securing subscriptions, commission on his own subscription as well as on those of others, when it does not impair the capital or charter surplus, may be adopted or ratified by a corporation.—Royal Casualty Co. v. Puller, Mo., 186 S. W. 1099.

35. **Damages**—Federal Employers' Liability Act.—In action under federal Employers' Liability Act, a proper element of damages for personal injury is compensation for plaintiff's being unable, because of injury, to follow such calling or business as he otherwise could have followed.—Chesapeake & O. Ry. Co. v. Meadows, Va., 89 S. E. 244.

36. **Death**—Pleading.—Where petition alleges cause of action under state law, and makes no reference to interstate commerce, answer denying paragraphs of petition does not extend beyond facts specifically alleged.—Central of Georgia Ry. Co. v. De Loach, Ga., 89 S. E. 433.

37.——Present Cash Value.—The present cash value of the future benefits of which beneficiaries were deprived by death is a proper measure of recovery in an action against an interstate railroad under the Employers' Liability Act as amended by Act April 5, 1910, for the benefit of the widow and dependent children.—Chesapeake & O. Ry. Co. v. Kelly, U. S. S. C., 36 S. Ct. 630.

38. **Deeds**—Sanity Presumed.—In suit to cancel a mortgage and deed on account of mental incapacity of mortgagor and grantor, where complainants made no proof of such incapacity at time of execution, they were not entitled to relief; the law presuming sanity.—Johnson v. Pinckard & Lay, Ala., 72 So. 127.

39. **Divorce**—Affirmative Relief.—Where the defendant wife was not seeking affirmative relief, and it appears that both parties were guilty of marital misconduct sufficient to entitle either to relief if other were innocent, plaintiff is not entitled to a divorce.—Hogsett v. Hogsett, Mo., 186 S. W. 1171.

40. **Easements**—Revocation.—The closing of a stairway and acquiescence therein for over 20 years held a revocation of the right to use it, regardless of whether the prior use was a license or merely permissive.—Raedell v. Anderson, Kan., 158 Pac. 45.

41. **Ejectment**—Burden of Proof.—Plaintiff in action for land, who relies on prior possession of his grantor, no written color of title being shown, must show that possessor had actual possession of whole tract, or define boundaries of tract occupied, so that it may be described in verdict.—Ragan v. Carter, Ga., 89 S. E. 206.

42. **Embezzlement**—Variance,—Ground of motion for new trial, in prosecution for larceny after trust, that indictment alleged appropriation of suit of clothes, while evidence showed appropriation of proceeds of sale of suit was without merit, where there was evidence that defendant never sold the suit, but wrongfully appropriated it.—Chancey v. State, Ga., 89 S. E. 461.

43. **Estoppel**—Inconsistency.—Insured was not estopped from suing on his policies because he had sued a third person for negligence resulting in the destruction of his house and goods, since there was no inconsistency in the two claims.—Aetna Ins. Co. v. Hann, Ala., 72 So. 48.

44. **Fish**—License.—Under Pub. Laws 1915, c. 235, regulating the shipment of lobsters without the state, held, that the breach of a vessel owner of the conditions of his license and bond by refusing to stop and submit to a search upon the order of a fish warden is a mere breach of contract and not a criminal offense.—State v. Le Blanc, Me., 98 Atl. 119.

45. **Fixtures**—Removability.—Where, in replevin to recover a tubular boiler sold by plain-

tiff under a contract reserving title, the boiler being annexed to the realty by the buyer, it appeared that the boiler could be removed without impairing the security of defendant, the holder of a prior real estate mortgage, held, that plaintiff was entitled to recovery.—Bramich v. Burkholder, Kan., 158 Pac. 63.

46. **Fraud**—Opinion.—The means of knowledge which the party making the representations has, of, by the party relying thereon, may properly be supposed to have, is a matter to be considered in determining whether the former makes the representations as a matter of opinion or as of facts within his knowledge.—Wakefield v. Moore, Mo., 186 S. W. 1148.

47. **Frauds, Statute of**—Pleading.—Whether agreement to pay is promise to pay debt of another cannot be raised under general assignment that verdict which covered amounts admitted to be due was contrary to law and evidence; statute of frauds not having been pleaded.—Battle v. Daniel, Ga., 89 S. E. 196.

48. **Fraudulent Conveyances**—Husband and Wife.—The wife of a debtor who owned a stock of groceries and had given trust deeds to secure creditors had a right to purchase the goods from him for a fair price, which the debtor applied on some of his debts.—Anderson v. Cleveland, Mo., 186 S. W. 1142.

49. **Gaming**—General Reputation.—Where, in prosecution for gaming, accused had not testified as witness in his behalf, nor in any way put his character in issue, the only evidence as to reputation permissible for state to offer was his general reputation as a gambler, under Acts 1909, p. 186, § 5.—Thornhill v. State, Ala., 72 So. 297.

50. **Husband and Wife**—Common Law Marriage.—A valid common law marriage will entitle a party thereto to maintain a suit for alienation of affections as in the case of a statutory marriage.—Butterfield v. Ennis, Mo., 186 S. W. 1173.

51.——Separate Maintenance.—After the death of a husband, held, that a separation agreement providing for separate maintenance would not be set aside, the wife having been represented by able counsel, on the ground that the husband's income entitled her to a greater sum.—Hogg v. Maxwell, U. S. D. C., 233 Fed. 290.

52. **Insurance**—Accident.—Where an accident policy provides an indemnity for loss of either hand by complete severance at or above the wrist, insured cannot recover, where he lost most of his hand, but a small portion, which was of practically no use, remained below the wrist.—Continental Casualty Co. v. Bows, Fla., 72 So. 278.

53.——Additional Insurance.—If both mortgagor and mortgagee of real estate have separate insurance upon their respective interests, then neither policy can be said to be "additional insurance" with respect to other policy, since the terms "additional insurance" and "other insurance," as used in policies providing a forfeiture, means the same insurable interest in the property.—Hackett v. Cash, Ala., 72 So. 52.

54.——Bonus to Agent.—In insurance agent's contract for bonus on business procured during the year, the words "sixty days allowed for settlements" held not to give interest in business done in the additional 60 days.—Reliance Life Ins. Co. v. Beaton, Tex., 187 S. W. 743.

55.——Estoppel.—Where an applicant for a policy of life insurance told agent that he was afflicted with some ailment, the nature of which was not disclosed, and that he had been treated by a physician, held not sufficient knowledge of agent based on plaintiff's statements, to estop company from avoiding policy.—Quinn v. Mutual Life Ins. Co. of New York, Wash., 158 Pac. 82.

56.——Forfeiture.—Where insured gave notes for premium providing that insurance should terminate if they were unpaid when due, though insurer retained notes unpaid after maturity, the insurance lapsed.—Dunn v. Columbia Nat. Life Ins. Co., Ga., 89 S. E. 432.

57.——Forfeiture.—Failure of insured to pay a premium note at maturity will not ordinarily ipso facto cause a forfeiture, though the note provides for the same.—Sims v. Jefferson Standard Life Ins. Co., Ga., 89 S. E. 445.

58.——Iron Safe Clause.—Insured, a retail merchant, who kept books showing last inventory and all purchases and cash sales in iron safe, substantially complied with iron-safe clause, notwithstanding occasional memoranda of short time credit filed in his desk until payment.—Houseman v. Globe & Rutgers Fire Ins. Co., W. Va., 89 S. E. 269.

59.——Preliminary Contract.—Where agent of fire insurance company authorized to issue policies and to make renewals was not required to receive premium in advance as condition precedent to making parol contracts to renew policy, he was authorized to make a preliminary contract binding upon the company to be consummated by filling out and delivering policy pursuant thereto.—Aetna Ins. Co. v. Short, Ark., 187 S. W. 657.

60.——Raise of Rates.—Benevolent order having power to amend its constitution may raise its rates notwithstanding clause in its laws that monthly payments of a member of the endowment rank shall continue the same as long as his membership continues.—Supreme Lodge K. of P. v. Mins, U. S. S. C., 36 Sup. Ct. 702.

61.——Regulation.—Insurance is a business affected with such public interest that it may be regulated by the state under the power to legislate for the common good.—La Tourette v. McMaster, S. C., 89 S. E. 398.

62.——Reserve Fund.—The equitable value of a life insurance policy constitutes its "reserve fund."—Ruane v. Manhattan Life Ins. Co., Mo., 186 S. W. 1188.

63.——Suicide.—An accident policy issued to one residing in the city of St. Louis, and who died there, was to be interpreted in connection with the suicide statute of the state.—Brunswick v. Standard Acc. Ins. Co. of Detroit, Mich., Mo., 187 S. W. 802.

64. **Intoxicating Liquors**—Evidence.—Testimony of drayman that he knew a certain person, and had never delivered anything to him but whisky, was not error, where bill for liquors, with order to ship to the person referred to, was afterwards introduced in evidence.—Borders v. City of Macon, Ga., 89 S. E. 451.

65.——Nuisance.—The illegal sale of intoxicating liquors cannot be enjoined when unaccompanied by circumstances making it a nuisance.—State ex rel. Lashly v. Kirkwood Leisure Hours' Social and Pastime Club, Mo., 187 S. W. 819.

66.——Storing.—Temporarily leaving liquor received from an express office in a house until one can leave work to carry it home is not violating an ordinance forbidding "storing" or "keeping" liquor elsewhere than at home.—Town of Newberry v. Dorrah, S. C., 89 S. E. 402.

67. **Landlord and Tenant**—Lease.—Where plaintiff agreed to lease a cigar store, neither the act of defendant in handing the lease to his cashier pending payment by plaintiff nor a delivery of lease to plaintiff for inspection only, constituted a delivery.—Clifford Cigar Co. v. Mahoning Inv. Co., Mo., 186 S. W. 1123.

68.——Re-entry.—The lessors' re-entry, when rightfully exercised, does not estop them from suing in equity to enforce their lien for unpaid rent on the improvements placed by the lessee on the leased property.—Eagle Coal Co. v. Gravlee, Ala., 72 So. 30.

69.——Repairs.—Where janitor of rented building makes light repairs, he is servant of proprietor in repairing threshold of room in apartment, rendering proprietor liable for injuries to tenant from his negligence.—Rankin v. Elizabeth Kountze Real Estate Co., Neb., 158 N. W. 378.

70. **Master and Servant**—Contract for Services.—A contract for services to be rendered for nine months for a stipulated monthly salary is an indivisible contract.—Jameson v. Board of Education, W. Va., 89 S. E. 255.

71.——Delegable Duty.—As construed by state courts, Laws Wash. 1897, c. 45, imposes a nondelegable duty on owners or operators of coal mines to prevent accumulation of gas, so that a fire boss is not a fellow servant of the miners.—Brown v. Pacific Coast Coal Co., U. S. S. C., 36 Sup. Ct. 701.

72.——Employment.—Where a servant was employed on agreed monthly wages, the pre-

sumption is, in the absence of anything to the contrary, that such relation continued until her death in service, and the law will imply no contract to pay more than the monthly wages from an increase of duties.—Leahy v. Cheney, Conn., 98 Atl. 132.

73.——Employment of Physician.—Where a physician was engaged by a life insurance company in a non-professional capacity as medical director to perform the functions of an executive officer, in case of wrongful discharge his recovery could be diminished by his earnings in other employments. But if he was engaged in his professional capacity to act as its medical examiner, and he was wrongfully discharged, his damages could not be diminished by what he earned in other employments. —Sturgeon v. Pioneer Life Ins. Co., Mo., 186 S. W. 1192.

74.——Inspection.—Under the Federal Employers' Liability Act and under the rules of defendant railroad requiring locomotives to be in good repair before leaving the engine house for road service, held an engine fireman was under no duty to make an inspection to discover the defective condition of an engine before taking it out of house.—St. Louis, I. M. & S. Ry. Co. v. Howard, Ark., 188 S. W. 14.

75.——Jurisdiction.—Congress, in giving state courts co-ordinate jurisdiction with federal courts in cases under the Federal Employers' Liability Act, by necessary implication adopted the procedure and practice of the state courts in their trials of such cases.—Chesapeake & O. Ry. Co. v. Meadows, Va., 89 S. E. 244.

76.——Protection to Employes.—At common law railroad is bound to protect employes and passengers from dangers which ordinary care and prudence could guard against, and, independent of statute, is bound to remove tree near track in danger of falling thereon.—O'Connor v. Chicago, M. & St. P. Ry. Co., Wis., 158 N. W. 343.

77.——Relief Fund.—Federal Employers' Liability Act, providing that a carrier may set off in suit for damages the amount of relief already paid, held not available, where the railroad had, at the time of suit, paid nothing under its relief contract.—Keels v. Atlantic Coast Line R. Co., S. C., 89 S. E. 388.

78.——Respondeat Superior.—The falling of rain on a roof, rendering it slippery, is not a defect for which a master would be liable to a servant injured by falling thereon while repairing it.—Roberts v. Pell City Mfg. Co., Ala., 72 So. 341.

79.——Respondeat Superior. — Defendant's chauffeur, in driving defendant's limousine for the convenience of defendant's son-in-law who could use the car when it was not being used by defendant, was acting within the scope of his employment, and defendant was liable for his negligence.—Freeman v. Green, Mo., 186 S. W. 1166.

80.——Respondeat Superior.—Where a master supplied a physician who set a servant's broken leg so it did not properly heal, master is liable for whole results of injury, though servant engaged others to rebreak leg to effect proper union.—Atlas Portland Cement Co. v. Hagen, U. S. C. C. A., 233 Fed. 24.

81.——Safety Appliances.—Violation of train order by motorman of interstate interurban railway does not suspend relation of employer and employe so as to absolve the former from his duty toward him under safety appliance acts.—Spokane & I. E. R. Co. v. Campbell, U. S. S. C., 36 Sup. Ct. 683.

82.——Statutory Negligence.—As a violation of Rev. St. Mo. 1909, § 7828, is negligence, recovery by an employe injured by the master's failure to comply therewith cannot be defeated on the ground of assumption of risk, urged as contributory negligence.—Atlas Portland Cement Co. v. Hagen, U. S. C. C. A., 233 Fed. 24.

83.——Workmen's Compensation Act.—Under Workmen's Compensation Act, art. 2, §§ 1, 21, article 3, § 16, and Pub. Laws 1915, c. 1268, an employe hired within the state, and while working for the master without the state, may recover for injuries received while without the state.—Grinnell v. Wilkinson, R. I., 98 Atl. 103.

84. **Mortgages**—Deed.—Where deed was given to secure debt, under agreement of grantee to reconvey to grantor if debt was paid within certain time, provision that it should not be regarded as a mortgage if payment was not made, but, grantee could take absolute title, did not change its character as a mortgage.—Marshall v. Russell, Colo., 158 Pac. 141.

85.——Payment.—Where a mortgagor paid the debt to the mortgagee's duly authorized agent, who released the mortgage given as security, the loss from misappropriation by the agent must fall on the mortgagee, regardless of the mode of misappropriation; the mortgagor not being a party, nor consenting thereto.—Olson v. Schulz, Wash., 158 Pac. 90.

86.——Payment.—Where creditors of the landowner permitted conveyance thereof to one of them on his filing declaration of trust, conditioned that he hold record title, receive rents and profits, and pay off an indebtedness evidenced by note and mortgage given to erect a building on the premises and for which he was personally liable, the debt was not discharged by payment of such note and mortgage, when another note and mortgage were given for part of original indebtedness.—Springer v. Bradley, Mo., 188 S. W. 175.

87. **Municipal Corporations**—Imputable Negligence.—While a passenger in a vehicle nearing a railroad crossing is not required to exercise the same watchfulness as the driver, he cannot rely implicitly on the care of the driver when in a position to see.—Lord v. Delano, Mo., 188 S. W. 93.

88.——Lien for Taxes.—Liens for taxes, special as well as general, take priority in the reverse order of other liens; that is, the lien of the last tax has priority.—Redemeier v. Perkinson, Mo., 186 S. W. 1107.

89.——Pedestrians.—The law applicable to pedestrians approaching street car and railroad tracks does not apply to pedestrians approaching a street frequented by automobiles.—Sullivan v. Chauvenet, Mo., 186 S. W. 1090.

90.——Repeal of Charter.—Where charter of town was repealed and its territory and property transferred to a city, there was no theoretical continuance of the town as to creditors to enable them to collect their debts.—Walker v. City of East Rome, Ga., 89 S. E. 204.

91.——Right of Way.—Driver of automobile in easterly or westerly direction, who, by city ordinance, had the right of way over the driver of another car proceeding north or south, was not thereby relieved of duty to exercise due care, though he could assume that drivers going north or south would respect the ordinance. —Freeman v. Green, Mo., 186 S. W. 1166.

92.——Special Assessment.—Under Kirby's Dig. §§ 5691-5696, touching actions against delinquent property by improvement districts, where plaintiffs' property was advertised for sale "owner unknown," and at the public sale was bid in by an attorney for improvement district commission, the sale was invalid.—Cabell v. Board of Improvement of Improvement Dist. No. 10 of Texarkana, Ark., 187 S. W. 666.

93.——Ultra Vires.—A municipality, authorized to erect and operate an electric lighting plant and to acquire property beyond its limits for corporate purposes, may without exceeding its authority construct a line of poles and wires to property so acquired, outside of its limits, to carry electric current to the town. —Town of Mansfield v. Cofer, Ga., 89 S. E. 410.

94. **Negligence** — Comparative Negligence.—In an action under the Federal Employers' Liability Act, where the cause of negligence is attributable partly to the negligence of the carrier and partly to that of the injured employe, an instruction that plaintiff can recover only a diminished sum bearing the same relation to the full damages that the negligence of the carrier bears to the negligence attributable to both is proper.—Blankenbaker v. St. Louis & S. F. R. Co., Mo., 187 S. W. 840.

95. **Parent and Child** — Stepfather.—While law does not require a stepfather to stand in loco parentis to stepchildren, by so receiving them, he incurs same liability as to own children, and, relationship being established, the

reciprocal rights and duties attach.—State ex rel. Deckard v. Macom, Mo., 186 S. W. 1157.

96. **Partnership**—Accounting.—A partner, excluded from participation in the firm business, is entitled in equity to an accounting and settlement, whether the nature of the account be simple or complicated.—Reilly v. Woolbert, Ala., 72 So. 10.

97. **Principal and Agent**—Evidence.—In an action for the price of a car of beer, where defendant sought to show that a third person was plaintiff's agent in the matter of its sale, the letters and bills of sale between plaintiff and such party, or the company which he represented, were admissible, on the subject of agency.—Colley v. Atlanta Brewing & Ice Co., Ala., 72 So. 45.

98.——Presumption of Knowledge.—The rule imputing agent's knowledge to principal does not apply when third party knew of circumstances indicating that the agent would not advise his principal.—Mutual Life Ins. Co. of New York v. Hilton-Green, U. S. S. C., 36 Sup. Ct. 676.

99. **Principal and Surety**—Insolvency.—Where holder of railroad bonds indorsed notes to bank to raise money for taxes on railroad it was not essential on insolvency of the railroad that indorser should have paid notes in order to have right to proceed to have debt paid out of railroad property.—Valdosta Bank & Trust Co. v. Pendleton, Ga., 89 S. E. 216.

100. **Railroads**—Contributory Negligence.—A pedestrian, who on approaching a crossing watched a moving lantern at one side and was struck by switching train without a light on front car, held not guilty of contributory negligence.—McWhirt v. Chicago & A. R. Co., Mo., 187 S. W. 830.

101.——Interurban Railway.—Passenger cars operated in trains on interurban interstate electric railway are not within exception in favor of cars used on street railway, made by amendment of March 2, 1903, to federal Safety Appliance Act March 2, 1893.—Spokane & I. E. R. Co. v. United States, U. S. S. C., 36 Sup. Ct. 668.

102.——Look and Listen.—In an action for damages to automobile struck by train, failure of plaintiff's chauffeur to stop his car and look and listen before attempting to cross the main track, and in crossing it at a speed of not less than two miles an hour, was, as a matter of law, contributory negligence barring a recovery.—Bailey v. Southern Ry. Co., Ala., 72 So. 67.

103.——Look and Listen.—The driver of a horse and wagon approaching a railroad track is bound to look and listen to make sure that the crossing is safe, and, where he did not do so from a point 90 feet away to a point 40 feet away through which his view was unobstructed, but continued to approach the crossing, he was negligent.—Southern Ry. Co. v. Mason, Va., 89 S. E. 225.

104.——Look and Listen.—Failure to look and listen when near a railroad track is negligence per se according to the Arkansas rule, but in Texas requires submission to jury.—St. Louis Southwestern Ry. Co. v. Carmack, Ark., 187 S. W. 635.

105.——Reciprocal Duty.—In action against railroad for death in collision of train with automobile, existence of house near track at crossing where accident occurred, obstructing view, was an element for consideration in determining degree of care to be exercised by decedent, imposing a like degree of care on defendant.—McKinney v. Port Townsend & P. S. Ry. Co., Wash., 158 Pac. 107.

106.——Setting Out Fire.—In action against railroad for fire from sparks, evidence merely that train passing shortly before the fire emitted volumes of smoke and steam, without any evidence as to sparks, justifies affirmative charge for defendant.—Turner v. Atlanta & St. A. B. Ry. Co., Ala., 72 So. 388.

107. **Sales**—Contract.—Under a contract for sale of automobiles, held that, while manufacturer could decline orders and limit liability was right of dealer to cancel agreement, yet where manufacturer, despite previous breaches by dealer, accepted orders, such acceptance was a waiver, rendering manufacturer liable for damages for failure to fill orders accepted.—Ford Motor Co. v. Johnson, Ga., 89 S. E. 430.

108.——Election of Remedy.—Where a contract for sale of onions to be grown was repudiated by buyer before time for performance, seller could accept repudiation and sue for damages, or elect to consider contract as still in force, treat onions as property of buyer, and sell them at time set for performance.—Texas Seed & Floral Co. v. Chicago Set & Seed Co., Tex., 187 S. W. 747.

109.——Failure of Consideration.—Where a horse sold under guaranty of proving a good producer was diseased when purchased, proved of no value for breeding, and soon died, and the seller refused to replace the horse pursuant to agreement, there was a failure of consideration of a note for the price.—Bank of Polk v. Wood, Mo., 186 S. W. 1186.

110.——Transfer of Title.—Where seller of three automobiles shipped them, omitting price of one car from draft attached to bill of lading, it did not part with title to such car.—Finney v. Studebaker Corp. of America, Ala., 72 So. 54.

111.——Waiver.—Where buyer of silo agreed that if any parts were found defective or missing, he would at once notify seller in writing but did not give notice until four months after delivery, seller, by entering into negotiations to remedy defects, waived delay in notice.—Western Silo Co. v. Carter, Kan., 158 Pac. 71.

112. **Specific Performance**—Right of Action.—Where defendants contracted to sell equity in mortgaged lands in consideration of release of bank's judgment against them, a deed reciting the mortgage and that bank assumed payment of mortgage not being in compliance with contract, by refusing to execute the deed in any other form they broke contract and were not in a position to seek specific performance of the contract.—Huffman v. Fudge, Ark., 187 S. W. 644.

113. **Street Railroads**—Negligence.—That a street car company employed and retained a careless motorman furnishes no basis for recovery for the death of one run down by a street car, but some affirmative negligence must be shown.—Virginia Ry. & Power Co. v. Davidson's Adm'r, Va., 89 S. E. 229.

114. **Subrogation**—Defined.—A legal subrogation, as distinguished from a subrogation arising out of convention or contract, does not arise until the surety has either paid or offered to pay the debt for which the principal is liable to protect his own interest or right.—Aetna Ins. Co. v. Hann, Ala., 72 So. 48.

115. **Taxation**—Board of Equalization.—Under Laws 1903, c. 73, county board of equalization may without application by taxpayer add omitted property to assessment of individual or increase valuation of his property.—Farmers' Co-op. Creamery & Supply Co. v. McDonald, Neb., 158 N. W. 369.

116. **Trover and Conversion**—Election of Remedy.—Sale of automobile to which manufacturer had title was conversion by party who sold it, for which manufacturer could maintain trover or could waive tort action and recover on common counts after disposition of car for money or other property.—Finney v. Studebaker Corp. of America, Ala., 72 So. 54.

117. **Vendor and Purchaser**—Notice.—Customary outbuildings do not put a prospective purchaser inspecting a farm on inquiry relative to the ownership of the buildings, though he knows that the farm is occupied by a tenant.—Roden v. Williams, Neb., 158 N. W. 360.

118. **Wills**—Evidence.—In will contest for fraud and undue influence, evidence as to how five years prior to making the will, testatrix acquired her property, or how much she may have contributed to its purchase by her deceased husband, or the reasons or motives that led her to make an earlier will which was not contested, was inadmissible.—Barnett v. Freeman, Ala., 72 So. 395.

119.——Gift.—Where a gift is to take effect in possession immediately upon the testator's decease, words of survivorship are regarded as intended to provide against the death of the objects of a gift in the testator's lifetime, and prima facie refer to his death.—O'Connell v. O'Connell, Ala., 72 So. 81.